NO. 49087-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHUNYK & CONLEY/QUAD C,

Appellant,

v.

PATTI C. BOETTGER,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

The effects of a work injury can evolve over time. An injury can render a worker temporarily disabled during one period but not another. So a worker's temporary disability status during one period is not relevant to whether the worker is temporarily disabled during another period.

The trial court correctly applied this principle. It properly declined to admit a previous jury verdict as an exhibit or to give jury instructions that Patti Boettger was not temporarily disabled during the two-month period before the 2006-2010 time period at issue in this appeal. Her disability status for the previous period is not relevant, and the trial court properly exercised its discretion when it made these decisions.

Additionally, this Court should not disturb the jury's verdict on substantial evidence review. The jury could find based on the testimony of Boettger's treating psychiatrist that her work-related depression prevented her from performing a gainful occupation with a reasonable degree of success and continuity during the relevant time period. And, despite evidence that a part-time job was available to her in 2006 within her restrictions, because there was no evidence the job was available during the entire disputed time period, the jury could have reasonably inferred that it was not available.

This Court should affirm.

II. ISSUES

1. Temporary total disability benefits are temporary benefits paid when a worker requires treatment and when she is unable to work. It contrasts with permanent disability benefits that are paid when a worker's condition is stable. Is a worker's temporary disability during one period of time relevant to her disability in a subsequent period of time when her condition is not stable?

2. A worker may receive temporary total disability if she cannot perform or obtain gainful employment that has "a reasonable degree of continuity and success." Boettger's psychiatrist said that she could not perform employment. And Quad-C produced no evidence that she could obtain employment during the entire relevant four-year period at the job that Quad-C found. Does substantial evidence support the jury's verdict that Boettger could not perform or obtain gainful employment?

III. STATEMENT OF THE CASE

A. Patti Boettger Injured Her Back at Work in 1998 and Continued to Work Until 2004 When She Had Back Surgery and Reported Depression

In 1998, Patti Boettger, a nurse, injured her back while transferring a patient. CP 384, 385, 518. At the time of her injury, she worked full time as a nurse restorative coordinator at a rehabilitation center in Tacoma. CP

21, 385, 410. Quad-C, a self-insured employer, owned the rehabilitation center. CP 384-85.

Boettger filed a workers' compensation claim, which the Department of Labor and Industries allowed. *See* CP 382. She received treatment for her back and for pain down her leg, including four steroid injections, physical therapy, and pain medication. CP 388, 406, 508.

After her injury, Boettger continued to work for several years. CP 408. In 2004, she was working as a charge nurse at a rehabilitation center in Bremerton. CP 408, 548. She quit that job and has not worked since. CP 411-12.

In 2004, Boettger had low back surgery. CP 15, 388, 518. Around that time, she reported depression. CP 273.

In 2006, Boettger experienced suicidal thoughts and visited the emergency room. CP 517. In 2006, she began receiving psychiatric treatment from Dr. Michael Pearson, who treated her for seven years and prescribed her medication. CP 516-17, 523. He diagnosed Boettger with major depressive disorder and pain disorder. CP 538. There is a final and binding order that the self-insured employer is responsible for Boettger's major depressive disorder under her workers' compensation claim. CP 249.

B. In 2006, Boettger Declined an Offer for a Part-Time Job That the Employer's Vocational Consultant Reported Was Available to Her

In 2006, vocational rehabilitation counselor Loren Forsberg prepared a job analysis for a part-time position of restorative coordinator at Heritage Rehabilitation, a nursing home.[1] CP 313, 319-21, 410, 454, 484. Sometime earlier, Quad-C had gone out of business. CP 329-30.

The job at Heritage required supervising restorative staff in delivering care, monitoring work assignments, communicating policies, assisting, and coaching. CP 484. According to the job analysis, Boettger could work from three to seven hours a day, and the pay rate was $21 per hour. CP 410. Forsberg confirmed with Heritage that this job was available. CP 321, 340.

In July 2006, Dr. Michael McManus, an occupational medicine doctor who was Boettger's attending physician at the time, approved the Heritage job analysis for four hours a day, five days per week. CP 335, 504, 506. He agreed that Boettger not could work more than four hours a day. CP 506.

In August 2006, Boettger was offered the part time job at Heritage. CP 410. She declined the offer. CP 410.

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[1] A job analysis differs from a job offer. As Forsberg explained at the hearing, a job analysis represents "an employment sample, which was in existence at the time of the completion of the job analys[i]s." CP 340. Job offers under RCW 51.32.090(4) must be with the "employer of injury."

Dr. Pearson testified that Boettger had major depressive disorder and pain disorder from October 24, 2006, through September 27, 2010. CP 538. He noted that her symptoms of depression fluctuated, and that they included sleep problems, low energy levels, sadness, guilt, difficulty concentrating, and "suicidal thoughts from time to time." CP 522. He believed that she had never recovered long enough or reached a point of stability to be able to obtain and perform reasonably continuous full-time work. CP 528. He agreed that her psychiatric diagnoses prevented her from being able to obtain and perform reasonably continuous full-time employment. CP 539.

Although Quad-C later claimed that Dr. Pearson only testified that Boettger could not work full-time and did not address her ability to work part-time (App. Br. 10-11), Dr. Pearson also opined about Boettger's general ability to work from a psychiatric perspective. He explained that "both major depressive disorder and pain disorder interfere with her ability to obtain and perform work." CP 539. He also testified that her depression prevents Boettger from obtaining and performing reasonably continuous work, without limiting this testimony to full-time work. CP 522. He explained that, during the times when she was primarily depressed, she may spend "pretty much the whole day just sitting and crying." CP 539-40. If she had to be at work on a day like that, "she would be fairly

unresponsive to the demands . . . of other people." CP 540. She would not be able to do things as quickly as other people, who would become frustrated with her. CP 540. She would be preoccupied with her depression and ruminations and would be less aware of what was happening around her. CP 540.

C. In 2009, a Jury Determined That Boettger Was Able to Work from August 19, 2006, Through October 23, 2006 and Therefore Not Entitled to Time Loss Compensation for That Period

In an earlier case, the Department ordered the self-insurer to pay time loss compensation from August 19, 2006, through October 23, 2006. *See* CP 87.[2] The employer appealed that order to the Board of Industrial Insurance Appeals and then to superior court. *See* CP 87. In 2009, a jury found that Boettger was not entitled to time loss compensation during that period because she was not temporarily and totally disabled. *See* CP 87. This order became final. *See* CP 87.

D. After the 2009 Jury Verdict, the Department Ordered the Self-Insured Employer to Pay Time Loss for the Period from October 24, 2006, Through September 27, 2010, and the Board Affirmed

After the jury trial, the Department issued an order for a different time period, ordering that the self-insured employer pay time loss from

[2] Although the jury verdict from the earlier case (CP 87) was not admitted into evidence, the Department refers to it for background purposes only since these facts are undisputed.

October 24, 2006, through September 27, 2010. CP 4. That is the order on appeal in this case. CP 4.

The employer appealed that order to the Board of Industrial Insurance Appeals and presented vocational and medical testimony, including Dr. McManus's opinion that he released her to the Heritage job for four hours a day, five days per week; Forsberg's testimony about the job analysis; the opinion of psychiatrist Dr. Richard Schneider that Boettger had no psychiatric restrictions preventing her from returning to work; and the opinion of Dr. Thomas Williamson-Kirkland, a physiatrist, that Boettger was able to work and that her depression did not prevent her from working. *See* CP 4, 252, 282, 319-21, 327, 352, 506.

Before the employer rested, it asked the judge to consider the jury's 2009 verdict as the "law in this case." CP 367. After a discussion with counsel, the hearings judge declined to make the verdict an exhibit. CP 369-70.

The Board found that, as a proximate result of her major depression, Boettger could not perform any employment because of restrictions in her ability to think, concentrate, remember short term, and interact with co-workers and patients between October 24, 2006, though September 27, 2010. CP 32.

E. The Trial Court Declined to Inform the Jury of the Previous Jury's Verdict, and The Jury Agreed That Boettger Was Temporarily Disabled During the 2006 to 2010 Period

Quad-C appealed to superior court. CP 1-2. It filed a pre-trial motion in limine to admit the verdict form from the 2009 trial. CP 604-05. The trial court denied the motion, stating in its oral ruling that "[t]his trial deals with a separate timeframe." CP 649-52; RP (11/18/15) at 15.

At the instruction conference, Quad-C proposed three different instructions, each with the goal of informing the current jury about the previous jury's finding. *See* CP 661-63. Its proposed instruction 5A read: "A finding of fact has been made that Ms. Boettger was not temporarily totally disabled from August 19, 2006 until October 23, 2006." CP 661. Its proposed Instruction 6 read:

> A decision rendered on a prior appeal, whether right or wrong, becomes the law of the case. That decision remains the law of the case unless there is a substantial change in evidence presented in a subsequent appeal.
>
> This appeal is the second appeal between these two parties. In the first appeal, a jury found that the defendant, Patti Boettger, was not temporarily totally disabled from August 19, 2006, through October 23, 2006, and thus was not entitled to receive time-loss benefits. Therefore, to uphold the Board of Industrial Insurance Appeals' decision in this appeal, the defendant must have presented substantial evidence that her condition has changed since October 23, 2006.

CP 662. And its proposed instruction 6A contained the same first paragraph as instruction 6, but excluded mention of the previous jury:

> It has already been determined that Patti Boettger was not temporarily totally disabled from August 19, 2006 through October 23, 2006, and thus not entitled to receive time-loss benefits.

CP 663.

The trial court declined to give any of these instructions. RP (11/23/15) at 7. During the conference, the trial court also stated that it affirmed its earlier decision not to admit the verdict form as an exhibit. RP (11/23/15) at 3-5.

The trial court also instructed the jury that a worker must be able "to obtain a gainful occupation with a reasonable degree of success and continuity" in order not to be totally disabled:

> Total disability is an impairment of mind or body that renders a worker unable to perform or obtain a gainful occupation *with a reasonable degree of success and continuity*. It is the loss of all reasonable wage-earning capacity. A worker is totally disabled if unable to perform or obtain regular gainful employment within the range of the worker's capabilities, training, education, and experience.
>
> A worker is not totally disabled solely because of inability to return to the worker's former occupation. However, total disability does not mean that the worker must have become physically or mentally helpless.

CP 692 (emphasis added). Quad-C did not take exception. *See* RP 11/23/15 at 13.

The jury entered a verdict finding that Boettger was a temporarily and totally disabled worker from October 24, 2006, through September 27, 2010. CP 714.

After the verdict, Quad C moved for a new trial and to vacate the jury verdict under CR 59. CP 703-10. In its motion, Quad C argued under CR 59(a)(7) that no evidence or reasonable inference from the evidence justified the verdict. CP 704-06. It also argued that the trial court should have admitted the verdict form or instructed the jury with its proposed instructions 5, 5A, or 6A. CP 706-09. The trial court denied the motion. CP 753-54.

IV. STANDARD OF REVIEW

In an appeal from a superior court's decision to this Court, the ordinary civil standard of review applies to review of the superior court decision. RCW 51.52.140; *Raum v. City of Bellevue*, 171 Wn. App. 124, 139, 286 P.3d 695 (2012). The appellate court does not review the Board decision, nor does the Administrative Procedure Act apply. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). This Court limits its review to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570

(1999). Applying the deferential substantial evidence standard, the court views the evidence in the light most favorable to the prevailing party. *Rogers*, 151 Wn. App. at 180.

The court reviews a trial court's refusal to give a proposed instruction for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). Trial court error on jury instructions requires reversal only if it is prejudicial, that is, only if the error affects the trial's outcome. *Id.* at 498-99.

Jury instructions are sufficient if they (1) allow each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Raum*, 171 Wn. App. at 142.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014). An abuse of discretion occurs when a trial court's exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

V. ARGUMENT

A. The Superior Court Did Not Abuse Its Discretion in Declining to Admit the Previous Verdict or in Declining to Give Quad-C's Proposed Instructions

The trial court properly declined to inform the jury, either by admitting a previous verdict as an exhibit or by giving Quad C's proposed

instructions, that Boettger had been determined to be able to work during a different time period than was at issue in the trial. Under well-established principles, this evidence is irrelevant and would be prejudicial to admit. Time loss compensation, a wage replacement benefit, is a benefit that a worker receives for temporary disability. It follows that a worker's temporary disability status during one period of claimed time loss compensation does not inform the worker's temporary disability status in another period. A worker's temporary disability status can change from one day to the next. So Quad C's argument to the contrary has no merit.

A previous jury's determination that Boettger was not temporarily disabled from August 19, 2006, through October 23, 2006, is irrelevant to whether she was temporarily disabled during a subsequent time period. An irrelevant fact is not a "material fact," contrary to Quad-C's repeated suggestion. App. Br. 3, 23.

1. A worker's total disability during one period is not relevant to whether the worker is totally disabled during another period

Under the Industrial Insurance Act, time loss compensation (also known as temporary total disability) continues only as long as the total disability from the work injury prevents the worker from returning to work: "When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as

the total disability continues." RCW 51.32.090(1). So time loss is temporary compensation to replace a worker's lost earning capacity. *See Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727, 952 P.2d 590 (1997).

Additionally, time loss compensation is payable only while the worker needs treatment for the work injury and cannot work at reasonably continuous gainful employment. *See Bonko v. Dep't of Labor & Indus.*, 2 Wn. App. 22, 25, 466 P.2d 526 (1970); *Hunter v. Dep't of Labor & Indus.*, 43 Wn.2d 696, 699-700, 263 P.2d 586 (1953). If a worker does not need further treatment, his or her condition is fixed and stable, meaning he or she is at maximum medical improvement. *See* RCW 51.32.055(1); WAC 296-20-01002 (definition of "proper and necessary"). At that point, the Department determines the appropriate permanent disability award, partial or total, if any, and closes the claim. *See* RCW 51.32.055(1), .080; *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 681, 94 P.2d 764 (1939); *Bonko*, 2 Wn. App. at 26. When a worker's condition reaches a fixed state—or a stable state—from which full recovery is not expected, the condition is considered to be a permanent one and the worker is no longer eligible for temporary total disability. *Hunter*, 43 Wn.2d at 699-700; *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 767, 215 P.2d 416 (1950).

Because time loss compensation is temporary, there "is no presumption that a temporary disability will continue into the future or that it has existed for a period into the past." *In re Mark Billings*, No. 70,883, 1986 WL 31854, *3 (Wash. Bd. Indus. Ins. Appeals, July 30, 1986).[3] This makes logical sense. Because disability is temporary, a worker's previous disability status has no tendency to make it more or less probable that the worker is temporarily totally disabled in a subsequent time period. *See* ER 401. An employer thus has to present a prima facie case regarding the disputed time frame, even if an order for another time frame was final and binding. *Id.*; *See Valdez v. Dep't of Labor & Indus.*, No. 33261-6-III, 2016 WL 4069732, *9 (Wash. Ct. App. July 28, 2016) (unpublished opinion) (approving of *Billings* analysis).

Although *Billings* and *Valdez* addressed the converse situation—a worker who claimed that a finding of temporary disability in one period meant that the worker was temporarily disabled in another period—the reasoning applies with equal force to a finding of non-disability. This is because temporary total disability is temporary in nature, and a worker or employer can produce evidence about disability or non-disability for each time period.

[3] The Board's interpretation of the Industrial Insurance Act is entitled to "great deference." *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

It would have been an error of law for the trial court to inform the jury about the previous time period through evidence or instructions, and it would have been prejudicial to do so. A jury could be improperly swayed by such evidence, not understanding that time loss benefits are for a limited duration, with specific evidence needed about the time period at issue.

Limiting the inquiry to the time period at issue is not only legally correct, it is fair to both employers and workers. In individual cases, both may endeavor, as a strategic matter, to admit evidence about a previous time period. But by recognizing that each period of temporary disability must stand on its own, the trial court correctly applied RCW 51.32.090's plain language and the relevant case law.

2. Quad-C offers no meritorious reason to consider the evidence

Quad-C offers a number of theories why the trial court erred, but none have merit. Each theory hinges on the idea that evidence about other time periods is relevant. It is not.

This is a different case than the one the previous jury considered. It does not "emanate from the same facts, the same injuries, and the same evidence," contrary to Quad-C's assertion. App. Br. 18; *see also* App. Br. 22. Although it involves the same injury, the facts and the evidence differ

in the two cases because they involve two different time periods. That both appeals addressed the "same injuries" or "same depression" does not mean that the jury must be informed whether those injuries or that depression was disabling during other times that are not covered by the present appeal. App. Br. 18, 22. A worker's injuries or depression can evolve and disable the worker during some periods but not other periods. Here, the jury had to decide whether Boettger was disabled during a specific period, and it found in her favor.[4]

Because the two cases address separate matters, the law of the case doctrine does not apply. Quad-C misunderstands this doctrine. *See* App. Br. 4, 17-19. It does not apply for two reasons. First, the doctrine is limited to rulings in the same case. *See Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 620, 724 P.2d 356 (1986) ("The law of the case doctrine applies only when an appellate court holding has issued in a prior appeal of the same case."); RAP 2.5(c) (restricting law of case doctrine "if the same case is again before the appellate court following a remand"). Quad-C concedes that this case involves a "different underlying cause of action." App. Br. 18. This is dispositive. Second, as noted, the Department does not dispute that the previous case resolved the issue of

[4] The court should disregard factual assertions not supported by the record such as that "[n]early all the evidence presented in this appeal . . . was identical to the evidence presented in the 2009 trial." App. Br. 18. The evidence from the other appeal is not included in the record.

temporary total disability for the two months at issue in that case. But, as stated repeatedly, this fact is simply not relevant. If the issue to be resolved in the appeal is different, as it is here, then the law of the case doctrine does not apply.

Likewise, Quad-C's arguments about inconsistent verdicts, judicial notice, and evidence before the Board all fail because they are based on the notion that the previous jury verdict is relevant. *See* App. Br. 9, 16, 24.[5] It is not. And the two verdicts are, in fact, entirely consistent.

Quad-C had a fair opportunity to argue its case to the jury based on the instructions given. It was not unfair to Quad-C that the trial court instructed the jury that Boettger's depression was related to her industrial injury but did not inform the jury about the previous jury verdict. *See* App. Br. 24-25. The causal relationship of depression is relevant, as Quad-C did not dispute at the Board hearing (CP 249), while the previous jury verdict is not.

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[5] The full context of the discussion cited by Quad-C indicates that neither the industrial appeals judge nor the Board took judicial notice of the verdict although the judge acknowledged that he "can take judicial notice" of what happened in the superior court case. *See* CP 367-370; *see also* CP 5, 20. Nor does it matter that the Board was in fact "aware" of the previous jury verdict. App. Br. 9-10, 15, 21. The Board and superior court are "aware" of many facts that are inadmissible, but they must serve in a gatekeeper role and apply the rules of evidence to ensure that the jury hears only admissible evidence. *See* ER 104 (superior court makes rules on preliminary questions regarding admissibility); WAC 263-12-115(4); *State v. Cochran*, 102 Wn. App. 480, 484, 8 P.3d 313 (2000). That is what happened here.

Finally, Quad-C received its statutory right to appeal, contrary to its arguments. Relying on the word "offered" in RCW 51.52.115, Quad-C suggests that it did not receive "a true appeal" because the jury should have been allowed to consider evidence that was offered, but not admitted, at the Board. App. Br. 19-20. This is nonsense. RCW 51.12.115 plainly provides only that the superior court considers the Board record, not that inadmissible testimony is automatically admitted at superior court. Quad-C's argument is just a backdoor attempt to have irrelevant evidence admitted.

B. Substantial Evidence Supports the Jury's Verdict Because the Jury Could Find That Boettger Could Not Perform or Obtain Gainful Employment with a Reasonable Degree of Continuity

A jury could reasonably find that Quad-C did not show that Boettger could perform or obtain gainful employment with a reasonable degree of success and continuity. Her treating psychiatrist opined that her major depressive disorder and pain disorder interfered with her ability to perform and obtain work. This is supported by the record. First, she could spend the "whole day just sitting and crying," which would make her unable to work. CP 540. And second, the jury could draw a reasonable inference from Quad-C's evidence that the proposed part-time nursing job available at Heritage in 2006 was not available during the entire time period at issue from 2006 to 2010. Applying the substantial evidence

standard, which requires the court to draw all factual inferences in the Department's favor, the lack of evidence showing job availability during the entire time period supports an inference that it was not available. So substantial evidence supports the verdict that Boettger could not work.

The jury correctly decided that Boettger was entitled to time loss compensation. Total disability is the inability to perform or obtain gainful employment generally available in the job market on a reasonably continuous basis. *See Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000); *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 813-15, 872 P.2d 507 (1994); WAC 296-20-01002 (defining "total temporary disability").[6] As the appealing party, Quad-C carried the burden at the trial court to show that the Board incorrectly found her unable to work during the relevant time period in 2006 to 2010. RCW 51.52.115.

1. Boettger could not perform reasonably continuous gainful employment

The law requires that a worker must be able to "perform[]" gainful employment. *See Hubbard*, 140 Wn.2d at 43. Substantial evidence supports that Boettger could not do so during the time period at issue.

[6] Courts like *Leeper* use cases involving permanent total disability in the context of temporary total disability because it "differs from permanent total disability in duration, not character." *O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760, 768, 109 P.3d 484 (2005).

The jury could have relied on the testimony of Dr. Pearson, Boettger's treating psychiatrist for over seven years, for support that she could not perform gainful employment. He testified that she had major depressive disorder, a condition related to her work injury, from October 24, 2006, through September 27, 2010, and that this disorder interfered with her ability to perform work. CP 538-39; *see also* CP 694. And he testified on a more probable than not basis that her depression prevents her from performing reasonably continuous work. CP 522. This testimony was made without regard to full-time or part-time work and supports a reasonable inference that she could not perform even part-time work due to her psychiatric conditions. Quad-C repeatedly focuses on portions of Dr. Pearson's testimony where he was asked about Boettger's ability to perform full-time work. App. Br. 27-28 (citing CP 522, 528, 539). But, on substantial evidence review, even though he did not specifically testify about part-time work, a jury could reasonably infer from his opinion that depression prevented her from performing reasonably continuous work (CP 522) that this also applied to part-time work. After all, someone who is crying "all day" is unlikely to be able to work, even part time. CP 540. The jury could have considered these opinions and concluded that Boettger would not be able to perform a gainful occupation "with a

reasonable degree of success and certainty" because of her psychiatric limitations.

Quad-C misleads the Court when it cites three lines from its cross-examination of Dr. Pearson to assert that "Ms. Boettger's own expert, Dr. Pearson, testified that Ms. Boettger's condition had actually *improved* from a mental health standpoint since October 23, 2006." App. Br. 18 (citing CP 558 ll. 11-13). But those three lines of testimony only established that on May 9, 2011—which is more than seven months after the time period at issue in this case—Dr. Pearson wrote in a chart note that "[h]er depression has improved since last time." CP 558. Quad-C did not establish when Dr. Pearson last saw Boettger before that date, and because he testified that "up to three months" was the longest time he had gone without seeing her since he began treating her in 2006 (CP 529), all that can be reasonably inferred from these three lines is that her depression improved between two visits outside of the relevant time period. Quad-C is wrong that these three lines establish that her condition had improved since October 23, 2006.[7]

[7] Similarly, in its statement of facts, Quad-C disregards the substantial evidence standard of review and cherry-picks Dr. Pearson's assessment in a November 20, 2006, chart note that Boettger's "depression seems to be improving" to support a broad assertion that "Ms. Boettger's medical records indicate that her depression *improved* during this new time-loss period . . . ." App. Br. 8 (citing CP 103); *see also* CP 551. But Dr. Pearson states immediately after in his testimony that her depression symptoms fluctuate and that, since October 2006, her depression symptoms are "really no better"

2. Boettger could not obtain reasonably continuous gainful employment

Even assuming that Boettger could perform the part-time job at the Heritage facility, substantial evidence shows that Quad-C did not prove Boettger could obtain employment during the entire time period at issue.[8] On the issue of obtaining employment, the jury could find that Quad-C did not present a persuasive case that she could obtain reasonably continuous part-time employment.[9]

Part-time employment may be gainful employment. The Heritage job paid $21 an hour, which would be gainful employment assuming a 20-

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and "probably worse at some times" and that her "day-to-day functionality has decreased." CP 551.

This Court does not re-weigh or re-evaluate evidence on appeal but, in any case, the cited portions of Dr. Pearson's testimony do not support Quad-C's broad assertion.

[8] A worker can be totally disabled if she can perform work within her restrictions but is unable to obtain work with a reasonable degree of success and continuity as a result of the work injury. *See Leeper*, 123 Wn.2d at 819; CP 692.

[9] The jury instructions in this case did not recite the rule that the employment must be generally available unless it is an "odd lot" job or "special work." *See* CP 676-698. A worker is totally disabled if he or she is not capable of reasonably continuous employment at any kind of generally available work. *Butson v. Dep't of Labor & Indus.*, 189 Wn. App. 288, 299, 354 P.3d 924 (2015). "General work means even light or sedentary work, if it is reasonably continuous, within the range of the claimant's capabilities, training, and experience, and generally available on the competitive labor market." *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 131, 913 P.2d 402 (1996). Even where the worker has proved that he or she cannot perform or obtain general work, an employer may avoid liability for time-loss compensation by proving that the worker can both perform and obtain "special work." *Graham v. Weyerhaeuser Co.*, 71 Wn. App. 55, 61-63, 856 P.2d 717 (1993), *overruled on other grounds by Leeper*, 123 Wn.2d at 818. In the absence of evidence that the Heritage job was generally available in the labor market, Quad-C would have had to prove that the job met the elements of "special work." The trial court did not give jury instructions to this effect. But because both "generally available work" and "special work" require employment with "a reasonable degree of success and continuity," it does not matter that Quad-C did not offer the correct jury instruction to argue for "special work."

hour work week because the weekly part-time earnings would exceed the minimum wage if looking to a full time employment pattern. CP 410; RCW 49.46.020; *In re Pauline Parker*, No. 14 12426, 2015 WL 4153110, at *5 (Wash. Bd. Ind. Ins. Appeals, June 10, 2015).[10] But that part-time work can be gainful does not mean, as Quad-C suggests, that substantial evidence did not support the jury's verdict.

That is because here, without objection, the trial court instructed the jury that, when addressing the issue of total disability, it had to assess whether the worker was unable to perform or obtain a gainful occupation "with a reasonable degree of success and certainty." CP 692; RP 11/23/15 at 13. This was the question that the jury had to consider for the entire time loss period from October 24, 2006, through September 27, 2010. CP 701. Applying this instruction, the jury could reasonably determine that the absence of testimony that the part-time position at Heritage was available from October 24, 2006, through September 27, 2010, meant that the position was not available with a reasonable degree of continuity. The jury could wonder whether a company that was not Boettger's employer of injury would be motivated to employ her as a part-time employee for

[10] The applicable minimum wage rates are available here: http://www.lni.wa.gov/WORKPLACERIGHTS/WAGES/MINIMUM/HISTORY/DEFAULT.ASP

four years. If the job was not available with a reasonable degree of continuity, then it would not be gainful.

Finally, Quad-C is incorrect when it narrowly frames the issue as "whether or not [Boettger] could work part-time," characterizes this as "the only issue on appeal," and asserts that "her capacity to work full-time was not before the jury." App. Br. 5, 11, 27. The jury verdict does not reference part-time or full-time work. CP 714. Instead, it asked the jury to decide whether Boettger was a temporarily and totally disabled worker from October 24, 2006, through September 27, 2010. CP 714. This required the jury to apply the definition of total disability to determine whether Boettger was able to perform and obtain "a gainful occupation with a reasonable degree of success and continuity." CP 692. A gainful occupation can include full-time and part-time employment. Although Quad-C's legal theory was that Boettger could perform and obtain part-time work at the Heritage facility, the jury rejected that theory and, as discussed above, substantial evidence supports that decision.

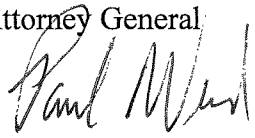
VI. CONCLUSION

This Court should affirm the jury's verdict. The trial court did not abuse its discretion in rejecting evidence and instructions concerning Boettger's disability during a time period that was not at issue in this appeal. Also, Quad-C fails to show that substantial evidence does not

support the jury's verdict. The jury could rely on the testimony of her treating psychiatrist to find that Boettger could not perform work, even part-time. And it could infer that because a part-time time job available to her in 2006 was not available during the entire time period at issue, she could not obtain work during that period with a reasonable degree of success and continuity.

RESPECTFULLY SUBMITTED this 23rd day of January, 2017.

ROBERT W. FERGUSON
Attorney General



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No. 49087-1-II

COURT OF APPEALS. DIVISION II
OF THE STATE OF WASHINGTON

CHUNYK & CONLEY/QUAD C, Appellant, v. PATTI C. BOETTGER, Respondent.	DECLARATION OF MAILING

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I filed and mailed the Brief of Respondent Department of Labor and Industries to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

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DATED this 23rd day of January, 2017.

EILEEN WEST
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

January 23, 2017 - 2:04 PM

Transmittal Letter

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